PATTON BOGGS LLP
ATTORNEYS AT LAW

DOCKET FILE COPY ORIGINAL

2550 M Street, NW
Washington, DC 20037-1350
202 457 6000

Facsimile 202 457 6315
www.pattonboggs.com

RECEIVED

AUG 26 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 26, 2004

Paul C. Besozzi
(202) 457-5292
pbesozzi@pattonboggs.com

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 04-30, Emergency Request for Declaratory Ruling

Dear Ms. Dortch:

This letter is in response to the June 22, 2004 and August 4, 2004 letters from SBC Telecommunications, Inc. ("SBC") in the above-captioned docket. Gemini Networks CT, Inc. ("Gemini") is compelled to respond to the inaccuracies reported in SBC's June 22, 2004 letter and to further respond to the August 4, 2004 letter.

First, while it is true, as reported by SBC, that the state court judge indicated at hearing that he would address only the state statutory claims raised by SBC, the state court decision did ultimately determine that the CT DPUC's order unbundling SBC's abandoned HFC network is consistent with federal law. See Memorandum of Decision, CV-04 0525443S, April 1, 2004 at 5, attached hereto as Exhibit A. Subsequent to the issuance of the state court decision, SBC requested clarification from the state court, seeking a specific statement by the state court that it did not intend to hold that the CT DPUC order is consistent with federal law and that such issue was specifically reserved for this Commission. See SBC's Motion for Clarification, CV-04 0525443S, April 8, 2004, attached hereto as Exhibit B. The state court expressly denied SBC's Motion for Clarification, ruling that the state statute required the court to determine whether or not the CT DPUC's ruling is consistent with federal law. See State Court ruling, CV-04 0525443S, April 21, 2004, attached hereto as Exhibit C. Thus, the state court did reach the issue and did determine that the order of the CT DPUC to unbundle SBC's abandoned HFC network is consistent with federal law.

Second, despite SBC's continued assertions that ratepayers did not ultimately fund or pay for the HFC network, the fact is that substantial portions of the HFC investment were funded and continue to be funded by SBC ratepayers. SBC's Connecticut UNE and wholesale rates were set based on the forward-looking costs of building and utilizing the HFC network. See Decision, Docket No. 96-09-22 DPUC Investigation Into The Southern New England Telephone

No. of Copies rec'd 0
List ABCDE

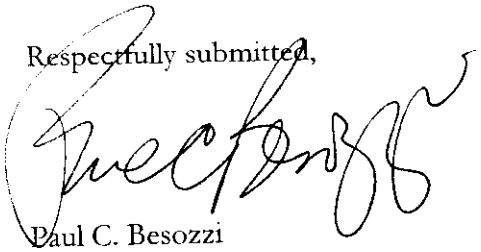
Company's Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund in Light of the Telecommunications Act of 1996, April 23, 1997, attached hereto as Exhibit D. Those UNE rates were not adjusted as a result of the abandonment of the HFC network. Accordingly, every time a CLEC orders a UNE loop, the CLEC is funding a portion of the abandoned HFC network. Additionally, a large portion of the HFC network remains in SBC's depreciation reserve. The Connecticut Office of Consumer Counsel has requested that the CT DPUC open an investigation into this matter. SBC's allegations concerning the accounting treatment of the HFC network do not recognize the distinction between "used and useful" for accounting purposes and "used for telecommunications" for unbundling purposes. Certainly, if the HFC network is unbundled, the currently unuseful plant will once again become used and useful for accounting and ratemaking purposes. In any case, the accounting treatment of this plant is a matter for the CT DPUC to determine and does not rise to the level of interest to trigger preemption by the Commission.

On August 24, 2004, the CT DPUC again reaffirmed that SBC's abandoned HFC network constitutes a UNE and is subject to the CT DPUC's state law unbundling authority. The CT DPUC's ruling is wholly consistent with the CT DPUC's rights under Section 251(d)(3) of the Act allowing state utility commissions to add to the federal list of elements to be unbundled. This Commission should decline to issue an order preempting the CT DPUC as the HFC network at issue is so unique and purely local in concern as to be exactly the type of state addition to the UNE list envisioned by the 1996 Act.

With respect to SBC's August 4, 2004 letter, Gemini must point out that the state unbundling order at issue in this matter is in no way similar to the pending preemption petitions on file with the Commission related to "actions taken by Pennsylvania and Tennessee." The Pennsylvania case referenced by SBC deals with the assessment of a discriminatory franchise fee on a CLEC by a Pennsylvania borough. It does not involve unbundling, nor does it involve an order of a utility commission. The Tennessee case involves a state unbundling order directly contrary to this Commission's findings in the *Triennial Review Order*. While Gemini takes no position on a state's authority to order unbundling contrary to this Commission's findings in the TRO, Gemini simply notes that the TRO did not deal with abandoned or HFC facilities of ILECs. Thus, there is no similarity. Furthermore, the Tennessee order relies in part on the Section 271 obligations of the ILEC. In Connecticut, the Southern New England Telephone Company is not an RBOC and thus, not subject to Section 271 obligations.

For all of the foregoing reasons, as well as the reasons previously articulated, the Commission should allow the state proceedings and appeals to decide this issue of purely local concern and decline to preempt the decisions of the CT DPUC.

Respectfully submitted,



Paul C. Besozzi

PCB:tmc

NO. CV 04 0525443S	:	SUPERIOR COURT
SOUTHERN NEW ENGLAND TELEPHONE COMPANY	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	
CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL, ET AL.	:	APRIL 1, 2004

MEMORANDUM OF DECISION

This case is an administrative appeal by Southern New England Telephone Company (SNET) of a final decision of the Connecticut Department of Public Utility Control (DPUC). This administrative appeal is authorized pursuant to Connecticut General Statutes §§ 16-35, 4-183 (Uniform Administrative Procedures Act) and 51-197b.

The parties to this appeal are SNET, which is a Connecticut corporation that provides local telecommunication services throughout Connecticut. SNET, which formerly was a monopoly provider of telephone service in Connecticut, is known for purposes of federal and state telecommunications law as an incumbent local exchange carrier (ILEC).

The defendant DPUC is an agency of the state of Connecticut charged with the certification and supervision of telecommunications companies in the state of Connecticut pursuant to Connecticut General Statute § 16-1 et seq. and the federal 1996 Telecommunications Act, 47 U.S.C. § 151 et seq. The individual defendants Downes,

Goldberg, Betkoski, Kelly and George are the commissioners of the DPUC and are sued in their official capacities only for declaratory injunctive relief.

Gemini Networks CT, Inc. (Gemini) initiated the petition to the DPUC which resulted in the decision which is the subject of this appeal. For purposes of the state and federal telecommunications law Gemini is known as a competitive local exchange carrier (CLEC).

The Office of Consumer Counsel (OCC) is authorized pursuant to Connecticut General Statutes § 16-2a ". . . , to act as the advocate for consumer interest in all matters which may effect Connecticut consumers with respect to public service companies, . . . and certified telecommunications providers. The Office of Consumer Counsel is authorized to appear and participate in any regulatory or judicial proceedings, federal or state, in which such interests of Connecticut consumers may be involved, . . ."

The petition by Gemini which initiated the DPUC proceedings was filed on January 2, 2003 and requested DPUC to issue a declaratory ruling finding that certain hybrid fiber coaxial (HFC) facilities owned by SNET, formerly leased to SNET Personal Vision, Inc. (SPV), constitute unbundled network elements (UNEs) and as such must be tariffed and offered on an element by element basis for lease to Gemini at total service long run incremental costs (TSLRIC) pricing. Gemini also requested that in addition to determining that the facilities or UNEs are subject to unbundling, the department initiate a cost of service proceeding to determine the appropriate pricing structure for the

elements based on TSLRIC; and direct SNET to file an inventory of all plant formerly leased to SPV including the current condition of all such plant and the disposition of any plant no longer in place.

In response to the petition SNET requested that the proceeding be bifurcated, with a first phase of the proceeding addressing the legal issues. The DPUC concluded that the SNET bifurcation proposal was of merit and adopted such a procedure.

While the proceedings before the DPUC on this petition were pending, the federal communications commission (FCC) issued its order in Triennial Review Proceeding (TRO) August 21, 2003.[1] The DPUC reopened the record of the proceeding and requested written comments and reply comments discussing the TRO as it may have addressed the petition. The DPUC subsequently issued its draft decision on the Gemini petition on November 3, 2003, pursuant to the Uniform Administrative Procedures Act (UAPA) the parties were offered the opportunity to file written exceptions and present oral arguments concerning the draft decision. The final decision on the Gemini petition, Docket No. 03-01-02 was issued December 17, 2003.

The office of the Attorney General for the state of Connecticut and Cable Vision

---

1

See Communications Commission Docket No. 01-339, in the matter of review of the section 251 unbundling obligations of incumbent local exchange carriers; CC Docket No. 96-98; implementation of the local competition provisions of the telecommunications act of 1996; CC Docket No. 98-147, deployment of wire line services offering advanced telecommunications capability which composed the TRO.

Light Path-CT, Inc. intervened in proceedings before the DPUC, but have not appeared in this administrative appeal of the DPUC decision.

The policy of both the federal and state governments with respect to telecommunications is to foster a competitive market in telecommunications. See the *Telecommmunications* Act of 1996, PUB. L. 104-104, 110 Stat. 56, codified as 47 U.S.C. § 151 et seq. and Connecticut Public Acts 94-83 and 99-122 codified as C.G.S. § 16-247a et seq.

The policy finds expression in § 16-247a entitled Goals of the State provides in pertinent part: "Affordable, high quality telecommunication services that meet the needs of individuals and businesses in the state are necessary and vital to the welfare and development of our society; the efficient provision of modern telecommunication services by multiple providers will promote economic development in the state; expanded employment opportunities for residents of the state in the provision of telecommunication services benefit the society and economy of the state; . . . , therefore, the goal of the state to . . . (2) promote the development of effective competition as a means of providing customers with the widest possible choice of services, (3) utilize forms of regulation commensurate with the level of competition in the relevant telecommunications service market; (4) facilitate the efficient development and deployment of an advanced telecommunications infrastructure, including open networks with maximum interoperability and interconnectivity; (5) encourage shared use of existing facilities and

cooperative developments of new facilities where legally possible and technically and economically feasible, ..."

The clear mandates of public policy favoring the unbundling of telephone company networks is subject to the provision of C.G.S. § 16-247b which specifically deals with unbundling of such networks. Pursuant to this section the DPUC on petition or its own motion may initiate proceedings to unbundle a telephone company's network ". . . which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations."

The court interprets the statute as requiring the DPUC to determine whether the facilities subject to unbundling are: (1) part of a telephone company network (UNE) used to provide telecommunication services (2) that unbundling is in the public interest (3) unbundling is consistent with federal law and (4) unbundling is technically feasible of being tariffed and offered separately or in combinations.

The court finds that the DPUC correctly determined that the HFC facilities constitute UNEs (unbundled network elements) which are used to provide telecommunication services and that their unbundling is in the public interest and consistent with federal law. The court finds however that the DPUC has failed to find or determine that the unbundling of the HFC network components are "technically feasible". Thus, for that reason the SNET appeal is sustained and the matter is remanded to the

DPUC to make what is a statutorily required finding or determination.

The DPUC decision, subject to this appeal is 50 pages in length and contains 41 findings of fact and conclusions of law. The decision and record contained extensive discussion of the HFC technology, but there is no specific discussion of the technical feasibility of unbundling for tariff of its various components. The court did not find any mention of technical feasibility of unbundling in the DPUC decision[2] nor was one pointed out by counsel at oral argument or in the briefs. The 41 findings of fact and conclusions of law do not in any way address the technical feasibility of unbundling the HFC system.

Gemini, DPUC and OCC argue that the technical feasibility of unbundling is apparent from the technical descriptions of the HFC system. It seems to be the case that the fiber component of the hybrid fiber coaxial system has in fact been unbundled. However, the court does not view its role as making the determination or finding which the legislature has directed the DPUC to make. It would be appropriate for the court in an administrative appeal to search the record for substantial evidence to support an agency finding, but it is quite another matter to make a required determination that the agency has failed to perform. Our Appellate Court has consistently in the context of UAPA

2

The DPUC decision at pages 28-29 quotes from the Federal Communication Act § 47 U.S.C. § 251 (c) (2) and § 251 (c) (3) including references to "technically feasible point of interconnection"; but this is not a reference to the technical feasibility of unbundling required by C.G.S. § 16-247b. The DPUC decision at page 13 acknowledges that SNET raised the issue of technical feasibility, but nowhere is it discussed or decided.

cases, declined to imply a finding of fact. In Crescimanni v. Department of Liquor Control, 41 Conn. App. 83 (1996) the agency denied a liquor permit under a statute (C.G.S. § 30-46 (a) (3)) which authorized a denial on the basis of the number of permits in the locality. The agency's decision failed to make a specific finding as to the number of existing permits. The agency asked the court to imply a finding in their decision. The court responded " . . . we will not ordinarily imply a finding of fact because the opportunity to read the collective mind of the department is fraught with danger. We have consistently declined the invitation to engage in such speculation." 41 Conn. App. at 88-89. It would seem especially inappropriate for the court to manufacture a finding of technical feasibility of unbundling; when it is a matter requiring agency expertise, and the decision lacks any discussion of the subject.

It would appear that if the DPUC had found technical feasibility of unbundling the HFC system, that the history of unbundling the fiber component and the leasing of a portion of the HFC system to SPV in the past might establish substantial evidence to uphold such a finding. However, the fact that an HFC system has never been used for telephony (Gemini's proposed use) and that no OSS (Operational Support Systems) exist for HFC telephony, suggest that technical feasibility of unbundling must be examined.

Despite the clear federal and state policy in favor of telecommunications competition through shared network facilities the court feels compelled to overturn the DPUC decision. In a recent case our Supreme Court in Southern New England

Telephone Co. v. Dept. of Public Utility Control, 261 Conn. 1 (2002), though upholding a DPUC decision, noted as follows: "We feel compelled, however, after our review of the department's decision in this case and in prior decisions offered by the department in support of this appeal, to caution the department that, in our view, it has failed to apply the necessary precision in its decisions. For example, the department determined in the present case that the plaintiffs enhanced services are not 'critical' or 'essential' services. The relevant determination, pursuant to §16-247b (b), however, is whether the services are 'necessary.' Moreover, the department's finding of fact did not include a finding that the plaintiff had, in fact, unreasonably discriminated or a finding that the public interest or competition had been impaired by the plaintiff's actions, thus warranting the department's intervention. Accordingly, we caution the department in future proceedings, it should set forth expressly the statutory provision upon which it relies to exercise jurisdiction and it should articulate specific findings of fact and conclusions of law consistent with the statutory requirements in support of its exercise of authority." 261 Conn. at 32-33.

In this instance, the DPUC is again exercising jurisdiction in accordance with § 16-247b. The statutory requirements supporting such exercise of authority include a determination that the UNEs being unbundled "are technically feasible of being tariffed and offered separately or in combinations". Despite the unanimous Supreme Court admonition over the assertion of authority under the same telecommunications statute, the

DPUC does not mention "technical feasibility" of unbundling in its 50 page decision or in its 41 findings of fact and conclusions of law. This case concerns more than semantic distinctions, as the decision fails to contain any subordinate facts or discussion which confront the technical feasibility issue under any euphemism.

The public policy favoring telecommunications competition and sharing of telecommunications networks does not obviate the role of the courts in insuring that such unbundling efforts are done in accordance with law. The federal courts on at least three occasions have found the FCC unbundling efforts unlawful in part. See AT & T Corp. v. Iowa Utilities Board, 525 U.S. 366, 389-90 (1999), United States Telecom Association v. FCC , (USTA I) 290 F.3d 415 (D.C. Cir. 2002), United States Telecom Association v. FCC, (USTA II) 00-10112, Slip OP. (D.C. Cir. March 2, 2004). The court, guided by such authority as well as SNET v. DPUC, supra is unable to ignore specific statutory mandates in an effort to facilitate broader telecommunications policy.

The respondents to the SNET appeal, in addition to arguing that technical feasibility of unbundling is apparent from the technical discussion of the HFC network, also argue that pursuant to § 251 of the 1996 Telecommunications Act that the technical feasibility is presumed and that SNET would have had the burden of demonstrating the technical and feasibility of unbundling. Pursuant to the 1996 Telecom Act, the technical feasibility is presumed; however, that does not remove the statutory obligation of the DPUC to make the presumption in a finding of technical feasibility of unbundling in the

specific case.

In further argument, the DPUC though conceding the statutory requirements of § 16-247b (a), at oral argument suggested that the enactment of the telecommunications act effectively amended the statute which was essentially passed in 1994 as Public Act 94-83. However that is inconsistent with the history of the amendment by Public Act 99-222 of the specific section of § 16-247b which did not amend the technical feasibility criteria. The § 16-247b (a) requirement that the unbundling be consistent with federal law, ~~essentially~~ the telecommunications act of 1996 also does not negate the continued requirement that the DPUC find that the unbundling of a telecommunications network element is technically feasible.

The appeal is affirmed. The DPUC is ordered to vacate its decision in Docket No. 03-01-02 the petition of Gemini and reopen such case to address the determinations and findings mandated by Connecticut General Statutes § 16-247b (a).

In view of the court's decision on the merits, the SNET motion for stay is granted.

Robert F. McWeeny

CV 04-0525443-S THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY V. CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL, ET AL.	SUPERIOR COURT JUDICIAL DISTRICT OF NEW BRITAIN APRIL 8, 2004

MOTION FOR CLARIFICATION

Pursuant to Connecticut Practice Book, the Plaintiff-Appellant, The Southern New England Telephone Company d/b/a SBC Connecticut ("Telco"), respectfully requests that the Court (McWeeny, J.) clarify a statement the Court made in its April 1, 2004 Memorandum of Decision vacating the Connecticut Department of Public Utility Control's ("DPUC") Final Decision dated December 17, 2003 to unbundle the Telco's Coaxial Facilities. Specifically, on page 5 of its Memorandum of Decision, after identifying the statutory prerequisites necessary to permit unbundling, the Court stated:

> The Court finds that the DPUC correctly determined that the HFC facilities constitute UNEs (unbundled network elements) which are used to provide telecommunications services and that their unbundling is in the public interest and consistent with federal law.

NO ORAL ARGUMENT REQUESTED
NO TESTIMONY NEEDED

The Telco submits that this statement in isolation implies that the Court supported or otherwise agreed with the DPUC's substantive findings that the Coaxial Facilities are indeed unbundled network elements ("UNEs") and that the DPUC's decision to unbundle was consistent with Federal Law. Rather, taken in its proper context, the Telco maintains that the Court was merely indicating that the DPUC had made the necessary findings in its Final Decision under Connecticut General Statutes §16-247b(a) that: (1) the DPUC found that the Coaxial Facilities constituted UNEs; (2) the DPUC found that unbundling the Coaxial Facilities was in the public interest; and (3) the DPUC found that unbundling the Coaxial Facilities was consistent with Federal Law. Indeed, the Court and the parties had specifically deferred the substantive federal issues involved in this Appeal – whether the DPUC's unbundling decision is consistent with federal law and whether the Coaxial Facilities could constitute UNEs under federal law – because the Telco has a pending petition before the Federal Communications Commission ("FCC") requesting that the FCC address the critical federal questions raised in the DPUC's findings. *See* WC Docket No. 04-30, *In the Matter of The Southern New England Telephone Company Emergency Request For Declaratory Ruling And Order Preempting A Decision By The Connecticut Department Of Public Utility Control*, Feb. 10, 2004.

Therefore, the Telco requests that the Court clarify its statement on page 5 of its Memorandum of Decision indicating that the Court did not intend to state that it found that the DPUC was substantively correct in making its findings that its actions were consistent with

federal law. In sum, such a clarification would allay any confusion regarding the Court's purpose and intent surrounding the statement.

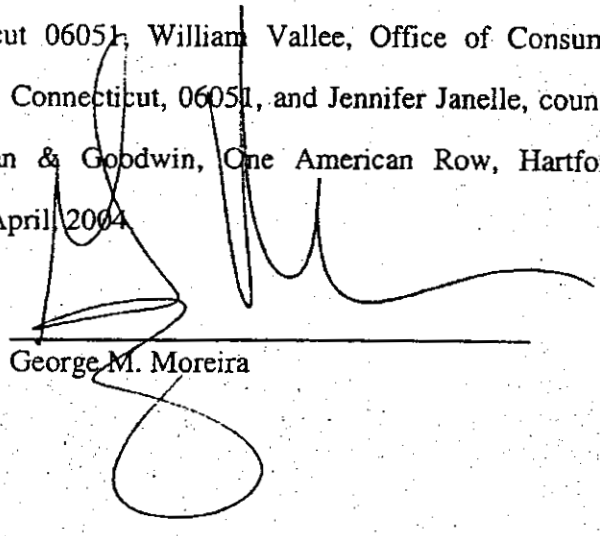
THE PLAINTIFF,
THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY

George M. Moreira, Esq.
Juris No. 409785
The Southern New England
Telephone Company
310 Orange Street
New Haven, CT 06510
Telephone: (203) 771-0902
Facsimile: (203) 771-6577

Dated at New Haven, Connecticut this 8th Day of April, 2004.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, first class, postage prepaid to all parties of record as follows: Tatiana D. Eirmann, Office of the Attorney General, 10 Franklin Square, New Britain, Connecticut 06051, William Vallee, Office of Consumer Counsel, 10 Franklin Square, New Britain, Connecticut, 06051, and Jennifer Janelle, counsel for Gemini Networks CT, Inc., Shipman & Goodwin, One American Row, Hartford, Connecticut 06103-2819 on this 8th day of April, 2004.



George M. Moreira

SOUTHERN NEW ENGLAND VS.
CT.DEPT.OF.PUBLIC CV-04-0525443-S

PLEASE BE ADVISED THAT THE FOLLOWING ORDER HAS BEEN ENTERED IN CONNECTION WITH THE ABOVE CAPTIONED MATTER:

MOTION FOR CLARIFICATION DATED 4/8/04.

DENIED - THE COURT WAS OBLIGATED TO ADDRESS THE CRITERIA OF SECTION 16-247B IN DETERMINING WHETHER THE DPUC DECISION WAS IN ACCORDANCE WITH STATE LAW.

MCWEENY, J.
4/21/04

DAMON GOLDSTEIN, COURT OFFICER

SHIPMAN & GOODWIN LLP
ONE AMERICAN ROW

SUPERIOR COURT
20 FRANKLIN SQUARE
NEW BRITAIN, CT 06051 HARTFORD CT 06103

DATED: APR 21, 2004
HHB

WC Docket No. 04-30
EXHIBIT C

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 96-09-22 DPUC INVESTIGATION INTO THE SOUTHERN NEW ENGLAND TELEPHONE UNBUNDLED LOOPS, PORTS AND ASSOCIATED INTERCONNECTION ARRANGEMENTS AND UNIVERSAL SERVICE FUND IN LIGHT OF THE TELECOMMUNICATIONS ACT OF 1996

April 23, 1997
By the following Commissioners:

Thomas M. Benedict
Janet Polinsky
Jack R. Goldberg

DECISION

TABLE OF CONTENTS

DECISION

I. INTRODUCTION

On July 1, 1994, Public Act 94-83, "An Act Implementing The Recommendations Of The Telecommunications Task Force" (the Public Act or Act), became Connecticut law. The central premise of the legislation is that broader participation in the Connecticut telecommunications market will be more beneficial to the public than will broader regulation. The Act entrusts the Department of Public Utility Control (Department) with the responsibility of implementing its important provisions.

Immediately upon passage of the Public Act, the Department established a framework for the implementation of Public Act 94-83. The Department intentionally designed its implementation process to chart an orderly transition to effective competition such that the full scope and scale of benefits envisioned by the Connecticut legislature in enacting Public Act 94-83 would be realized. The implementation decisions have consistently reflected the Department's commitment to ensure that: (1) all telecommunications providers, new entrants as well as incumbent telephone companies, are able to fairly compete in the Connecticut telecommunications market; and (2) the interests of the Connecticut public are protected. To date, the efforts of the Connecticut legislature and the Department have resulted in the certification of 18 companies to provide local telecommunications services in Connecticut in direct competition with the incumbent telephone companies; 1 application is pending before the Department. Each certified local exchange carrier (CLEC) has committed to serving any customer in its respective service area(s), i.e., any residential or business user that requests service, within three years of the CLEC's certification. The legislative goal that Connecticut residents be afforded a greater choice among telecommunications products, providers, and prices is being realized.

II. PARTIES AND INTERVENORS

The Department recognized as parties in this proceeding: the Southern New England Telephone Company (SNET), 227 Church Street, New Haven, Connecticut 06510; the Office of Consumer Counsel (OCC), 136 Main Street, Suite 501, New Britain, Connecticut 06051; AT&T Communications of New England, 32 Avenue of the Americas, New York, New York 10013; MCI Telecommunications Corporation, Five International Drive, Rye Brook, New York 10573-1095; MFS Intelenet of Connecticut, Inc. (MFSI), 6 Century Drive, Suite 300, Parsippany, NJ 07054; Connecticut Telephone (CT-TEL), 1271 South Broad Street, Wallingford, Connecticut 06492; Cablevision Lightpath, Inc., (Cablevision), 111 New South Road, Hicksville, New York 11801; and Frontier Communications (Frontier), 29 Church Street, P.O. Box 967, Burlington, VT 05402-0967. Separately, Brooks Fiber Communications (Brooks), Connecticut Ad Hoc Telecommunications Users Group (Ad Hoc), MFS Telecom, Inc. (MFS), New England Cable Television Association, Inc. (NECTA), Sprint Communications Company L.P. (Sprint), Teleport Communications Group (TCG), WilTel, Inc. (WilTel), and Message Center Beepers, Inc. (Message Center) requested and were granted intervenor status.

III. DOCKET HISTORY AND CONDUCT OF THE PROCEEDING

A. PRIOR RELEVANT IMPLEMENTATION PROCEEDINGS

Public Act 94-83 articulates as a goal of the state the "efficient development and deployment of an advanced telecommunications infrastructure, including open networks with maximum interoperability and interconnectivity" and further encourages the "shared use of existing facilities and cooperative development of new facilities where legally possible, and technically and economically feasible." Conn. Gen. Stat. § 16-247a (a). From the outset of its efforts to implement Public Act 94-83, the Department asserted its view that "the telecommunications infrastructure will play a dominant role in the success or failure of the development of effective competition in Connecticut's telecommunications marketplace and will thus greatly determine the public benefit to be derived from Public Act 94-83." Decision, Docket No. 94-07-01, The Vision for Connecticut's Telecommunications Infrastructure, November 1, 1994, p. 33. Therefore, the Department approached its implementation efforts with "a commitment toward facilitating the development of independent networks physically interconnected, functionally integrated and technically interpositioned with those of the incumbent telephone companies." Id., p. 29.

The Department initially focused on SNET's infrastructure, currently the primary telecommunications infrastructure in Connecticut. Through a series of proceedings, the Department determined that SNET must make available to its competitors for resale SNET's residential and business local basic telecommunications service as well as unbundle the noncompetitive and emerging competitive functions of its local telecommunications network that are used to provide telecommunications services and which are reasonably capable of being tariffed and offered as separate services. The Department also concluded that prices for use of SNET's infrastructure should be set at Total Service Long Run Incremental Cost (TSLRIC) plus some markup to provide a contribution to common costs not otherwise recognized and recovered in the TSLRIC analysis. See Decision, Docket No. 94-10-01, DPUC Investigation into The Southern New England Telephone Company's Cost of Providing Service.

B. INITIAL INVESTIGATION IN DOCKET NO. 95-06-17

With the above-described background and pricing policy as its guide, the Department undertook its initial investigation and issued its first Decision in Docket No. 95-06-17, Application of the Southern New England Telephone Company for Approval to Offer Unbundled Loops, Ports and Associated Interconnection Arrangements, on December 20, 1995. In that initial proceeding, SNET submitted for the Department's consideration, proposed rates and charges to be charged CLECs for use of SNET's unbundled loops, ports, network feature enhancements, interoffice facilities and a prepackaged wholesale local service offering. SNET also presented a proposal for a Universal Service Fund (USF) considered essential by SNET to mitigate any negative effects of transitioning to a multi-provider marketplace. In its Decision, the Department reiterated its opinion regarding the importance of determining reasonable cost thresholds.

> A generally recognized and accepted tenet embodied in Public Act 94-83 is that cost must serve as the primary determinant of telecommunications prices if economic efficiency is to prevail in the multi-provider market envisioned by the legislature. Determining appropriate cost thresholds for services such as those presented in this proceeding is especially important. The services proposed in this proceeding represent exclusive offerings of SNET which will be made available to prospective competitors for reuse in their own competitive service offerings. A cost and associated price that is too high will discourage competitive entry and severely limit broader market participation. A cost and associated price that is too low will greatly increase the level of financial benefit presented to prospective providers by resale competition and discourage the development of alternative telecommunications infrastructure in Connecticut, possibly limiting the choice of services and providers intended by passage of Public Act 94-83.

December 20, 1995 Decision, Docket No. 95-06-17, p. 73 and 74. The Department thus undertook its analysis with full appreciation for the competitive consequences of its decisions regarding the pricing of unbundled network elements and wholesale local service.

As described by the Department in its December 20, 1995 Decision, the point of principal contention in the initial proceeding concerned SNET's representations of the estimated costs it will incur in making unbundled services and wholesale local basic service available to its competitors. SNET constructed its rate proposals in the proceeding on a series of self-directed financial analyses in an effort to demonstrate for the Department the underlying cost associated with providing each of the respective unbundled service offerings. Other participants argued that SNET's cost studies were flawed and therefore resulted in such inflated estimates of costs that wholesale rates based on those costs would be competitively unbearable. Id., p. 76.

In the December 20, 1995 Decision, the Department determined that SNET's cost studies contained substantive deficiencies. Those deficiencies included:

- the failure to provide sufficient documentation to enable independent evaluation of both the methodology used and the cost study results; Id., p. 77;
- use of a cost allocation methodology previously rejected by the Department; Id., p. 78;
- use of a long run incremental cost methodology inconsistent with the Department's previous instructions that all costs must be treated as variable; Id.;
- use of capacity cost which generated a deficiency allowance unrelated to actual loop use; Id.;
- failure to comply with Department orders regarding depreciation; Id., p. 79;
- use of an excessively high figure for investment for digital loop carrier; Id.;
- failure to adhere to jurisdictional separations rules prescribed by the Federal Communications Commission (FCC) and failure to recognize the cost responsibility of other services that use the local loop; Id.;

- failure to provide sufficient evidence that SNET had compiled cost estimates as if it were providing facilities on a bulk basis to other carriers rather than on an individual subscriber level; Id.;
- failure to provide justification for the connection and disconnection cost estimates associated with increased customer "churn"; Id.; and
- failure to provide a reasonable explanation to justify the inclusion of pole attachment expenses in the unbundled loop study. Id.

Having set forth the deficiencies in SNET's cost submissions, however, the Department stated that, with modifications to SNET's study parameters and methodologies, SNET could, in the near future, submit to the Department proposed rates and charges that would be fair, reasonable, foster competition and further the public's interest. Id., p. 81. However, in the interim, the Department recognized the importance of making unbundled services and wholesale local basic service available to CLECs. The Department, therefore, set interim rates for the relevant services, subject to modification upon filing of accurate and corrected TSLRIC studies by SNET. Id., p. 83. As the Department stated, the interim rates were priced at a level to encourage the development of effective competition and provide a necessary incentive to SNET to refile as quickly as possible an acceptable set of costs and proposals from which the Department could establish final rates and charges. Id., p. 84.

In the December 20, 1995 Decision in Docket No. 95-06-17, the Department also determined that, by providing deficient cost studies, SNET had failed to demonstrate that its costs for providing local service warrant further financial support. Therefore, the Department held that for purposes of the interim period, until such time as the Department accepted newly-filed cost studies, the Department could not endorse any USF or establish a USF contribution requirement. Id., p. 82.

Pursuant to the Department's December 20, 1995 Decision, on April 29, 1996, SNET filed with the Department revised cost of service studies for its unbundled loops, ports, wholesale local basic service and associated interconnection service (collectively, revised cost studies). By Decision dated June 5, 1996, the Department reopened Docket No. 95-06-17 for the limited purpose of reviewing SNET's revised cost studies and reexamining interim rates established in the December 20, 1995 Decision.

On March 25, 1997, the Department rendered its Final Decision in Docket No. 95-06-17. In that Decision, the Department determined that SNET's avoided cost study was of sufficient quality to serve as the foundation for developing a wholesale discount rates as modified, and would serve as a financial baseline. The Department also concluded that a minimum discount rate of 17.80% was reasonable for SNET's services, additional discounts were permissible, and that the terms of individual interconnection agreements or arbitration awards should control the commercial relationship between the parties rather than generic tariffs.

C. THE TELECOMMUNICATIONS ACT OF 1996

Subsequent to the Department's issuance of its Decision in the initial investigation in Docket No. 95-06-17, (and more than a year and a half after Connecticut opened its telecommunications markets to competition), the United States Congress passed legislation, in the form of the Telecommunications Act of 1996 (1996 Federal Act or FTA), designed to revise U.S. telecommunications policy and to remove unwarranted statutory and court-ordered barriers to competition among segments of the telecommunications industry.

Similar to the Connecticut requirements, the 1996 Federal Act requires incumbent local exchange carriers, among other things: (1) to allow other telecommunications carriers to interconnect with the incumbent LEC's existing local network to provide competing local telephone service; (2) to provide other telecommunications carriers access to elements of the incumbent LEC's local network on an unbundled basis; and (3) to sell to other telecommunications carriers, at wholesale rates, telecommunications services that the incumbent LEC provides to its retail customers. 47 U.S.C. § 251(c).

The 1996 Federal Act requires that the rates for an incumbent LEC's unbundled network elements and interconnection of facilities and equipment be nondiscriminatory, and "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," and further provides that the rates "may include a reasonable profit." 47 U.S.C. § 252(d)(1). As the Department has previously stated, this statutory requirement is not inconsistent with the Department's efforts to set SNET's rates for interconnection and network elements at TSLRIC plus a reasonable contribution. See Decision, Docket No. 94-10-04, DPUC Investigation into Participative Architecture Issues, August 7, 1996, p. 55.

Additionally, the 1996 Federal Act requires incumbent LECs to privately negotiate, in good faith, comprehensive agreements with other telecommunications carriers seeking to enter the local market. 47 U.S.C. §§ 251(c)(1) and 252(a). If the incumbent LEC and the carrier seeking entry are unable to reach a negotiated agreement, either party may petition the relevant state commission to conduct a compulsory arbitration of the open and disputed issues and arrive at an arbitrated agreement. 47 U.S.C. § 252(b). The final agreement, whether negotiated or arbitrated, must be approved by the state commission. 47 U.S.C. § 252(e)(1). Certain portions of the 1996 Federal Act also require the FCC to participate in the FTA's implementation. (See, for example, 47 U.S.C. §§ 251(b)(2), 252(d)(1), 251 (e), and 252(e)(5)).

D. FCC REPORT AND ORDER

On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order, CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and CC Docket No. 95-185, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, (First Report and Order) implementing the 1996 Federal Act as interpreted by the FCC. The First Report and Order concerns the local competition

provisions of The Telecommunications Act of 1996, specifically, Sections 251 and 252. Those sections address, but are not limited to, the intrastate aspects of interconnection, resale services and access to unbundled elements, including the pricing standards as discussed above.

Included in the First Report and Order are FCC rules regarding the pricing for interconnection and unbundled elements and for wholesale rates. Regarding the former, the FCC requires that state commissions set arbitrated rates for interconnection and access to unbundled elements pursuant to a forward-looking economic cost pricing methodology.[1] The FCC concluded that the prices that new entrants pay for interconnection and unbundled elements should be based on the LEC's Total Element Long Run Incremental Cost (TELRIC) of providing the particular network element, plus a reasonable share of forward-looking joint and common costs deemed applicable to the price of the service.

E. STAY OF RELEVANT PROVISIONS OF THE FCC'S FIRST REPORT AND ORDER

On September 10, 1996, SNET filed a Petition for Review and Motion for Stay and Expedited Review of the FCC's First Report and Order with the United States Court of Appeals. SNET's appeal was consolidated with others in the Eighth Circuit Court of Appeals. On September 27, 1996, the Eighth Circuit Court of Appeals issued a temporary stay of the FCC's First Report and Order pending oral argument and decision on the various stay motions filed with the Court. On October 15, 1996, the Eighth Circuit issued its decision on the stay motions, ruling to stay the operation and effect of the pricing provisions, among other things, contained in the First Report and Order pending the court's final determination of the issues raised by the pending petitions for review. Subsequently, on November 12, 1996, a full panel of the U.S. Supreme Court denied an appeal of the stay. 136 L.Ed.2d 328 (December 18, 1996). On January 17, 1997, the Eighth Circuit Court of Appeals heard oral arguments on the appeal on the merits. No decision has been released to date.

F. SCOPE AND CONDUCT OF THE PROCEEDING

On October 30, 1996, the Department issued a Procedural Order in Docket No. 95-06-17 stating that, in light of the Stay, that proceeding was not governed by the pricing restraints contained in the FCC's First Report and Order. The Department noted, however, that the interim wholesale local basic service rates approved in the Department's December 20, 1995 Decision in Docket No. 95-06-17 were not consistent with the requirements of the 1996 Federal Act and must be modified. As explained in detail above, the Department when setting those rates in the December 20, 1995 Decision did not do so at retail minus the costs attributable to any marketing, billing and collection, and other costs that SNET would avoid when providing wholesale local service as required by the 1996 Federal Act. The Department thus determined that in Docket No. 95-06-17, it would examine SNET's July 15, 1996 avoided cost studies and its July 23, 1996 proposed wholesale local service rates in order to establish permanent

[1] The specific methodology adopted by the FCC was rejected by the Department in its June 15, 1995 Decision in Docket No. 94-10-01, DPUC Investigation into the Southern New England Telephone Company's Cost of Providing Service.

wholesale local basic rates in compliance with the requirements of the 1996 Federal Act. The Department also initiated this proceeding to investigate SNET's proposal to offer unbundled loops, ports and associated interconnection arrangements and Universal Service Fund[2] initially filed in Docket No. 95-06-17.

By Notice of Hearing dated January 14, 1997, public hearings were conducted on February 3, 4, 5, 6, and 7 1997, in the offices of the Department Ten Franklin Square, New Britain, Connecticut 06051. The hearing was continued to February 24, 1997, at which time it was closed. The Department issued a draft Decision in this proceeding on March 31, 1997. Pursuant to Notice, all parties and intervenors were provided opportunity to file written exceptions and to present oral arguments on the draft Decision.

G. CONCEPTUAL FRAMEWORK

This proceeding involves an investigation by the Department of SNET's proposal to offer the following unbundled elements: loop, network interface device, local and tandem switching, interoffice transport, signaling and call related data bases, Operational Support Systems, and Operator Services and Directory Assistance. The instant docket, therefore, continues to provide an essential foundation for subsequent tariff filings by SNET. The Department undertakes this investigation with the objective of ensuring the availability and affordability of services, features and network elements of SNET's local telecommunications infrastructure considered needed, necessary and/or useful by prospective providers to the provision of certain telecommunications services in competition with SNET. As the legislature mandated in Public Act 94-83, the goal of the Department's efforts is to ensure that the Connecticut public has greater choice of telecommunications products, prices and providers.

In this proceeding, SNET presents proposed rates and charges for unbundled services, and features. Other participants in this proceeding universally challenge SNET's claim that its proposed rates and charges are fair and reasonable, and have asked the Department to reduce those rates and charges in order to foster the development of competition in the telecommunications markets. This proceeding has involved extensive submissions by participants and exhaustive review by the Department in an effort to ensure fair and equitable treatment of unbundling issues. It is uncontroverted that this Decision will have enormous effect upon the transformation of Connecticut into the multi-provider market envisioned by the legislature with passage of Public Act 94-83. As the Department noted in its Final Decision in Docket No. 94-07-01, the experience of the interexchange carrier services market segments suggests the existence of a strong causal relationship between the price charged by telephone companies for services considered by would-be competitors to be essential to the emergence of broader participation in the provision of telecommunications services. Decision, November 1, 1994, p. 14.

---

[2] Office of Consumer Counsel and AT&T Communications of New England on December 24, 1996 and December 26, 1996 respectively, separately requested the Department to postpone consideration of SNET's Universal Service Proposal. By letter dated January 10, 1997, the Department granted their request.

As will be evidenced throughout the summaries of the participants' positions in the following section, three issues must be addressed in this Decision: costs, contribution and competitive consequence. None of the three issues is a new topic of interest before to the Department. To the contrary, they have each been examined extensively in prior regulatory proceedings and the Department has developed certain positions that provide a partial foundation for the Department's efforts in this proceeding. A brief narrative of the history of the Department's Decisions on the relevant issues is thus necessary.

The subject of costs was examined in great detail in Docket No. 88-03-31, Department of Public Utility Control Investigation into the Costs of Providing Intrastate Telecommunications Services by the Southern New England Telephone Company, where the Department ordered SNET to construct its future cost representations to the Department using Long Run Incremental Cost (LRIC) and Fully Distributed Cost (FDC) techniques. The two methodologies each measure costs associated with any particular service, albeit distinctly different types of costs depending upon the methodology employed. LRIC methods are generally considered a prospective methodology because they measure the level of incremental cost to be incurred in consequence of producing an additional unit of any service. Thus, LRIC methodologies provide the user a means to determine the additional cost incurred by a provider to meet any future demand for a service. In contrast, FDC methods tend to exhibit retrospective attributes, distributing the total costs incurred by a company in providing a service over the total units of production or demand to develop an average unit cost.

In Docket No. 94-10-01, DPUC Investigation into The Southern New England Telephone Company's Cost of Providing Service, the Department expressed its preference, in light of Public Act 94-83, for the Total Service Long Run Incremental Cost (TSLRIC) methodology over both LRIC and FDC methodologies whenever possible in the belief that TSLRIC better demonstrates the relative impact of technological progress and competitive proficiency on current financial commitments of the sponsor.[3] The TSLRIC methodology represents a modification of the LRIC approach by utilizing total demand for a service as the base for calculating the incremental cost of addition, replacement or enhancement to the service. This produces a forward-looking cost similar to the LRIC methodology, but reduces some of the economic distortions that might otherwise emerge using a narrower base of analysis.

TSLRIC, however, does not fully capture certain costs incurred by the provider in the conduct of making available a particular service, which costs are otherwise reflected in FDC methodologies and for which the provider is entitled under current regulatory scenarios to be compensated. These costs are generally referred to as common costs

[3] The FCC in its First Report and Order has concluded that the prices for services which new entrants would pay for interconnection and unbundled elements should be based on the LEC's TELRIC of providing the particular network element, plus a reasonable share of forward-looking joint and common costs deemed applicable to the price of the service. Nevertheless, the Department reaffirms its Decision in Docket No. 94-10-01 that TSLRIC is the optimum costing methodology. However, consistent with that Decision, the Department has continued to permit, and encourages the development, introduction and submission of alternative cost analysis for its review. See the Department's December 12, 1996 response to SNET's Motion No. 2 in this proceeding.

(or shared costs) and are not sufficiently distinguishable to be attributed to a single service in a TSLRIC study. In FDC studies, such costs would be included at the aggregate cost level and apportioned over each unit of service. Thus, recovery of those costs would be the shared responsibility of users of the associated service.

The Department has maintained that telephone companies are rightfully entitled to recover common costs previously deemed prudent by the Department in the course of designing rates for their services. Given the fact that TSLRIC methodologies make no provision for the incorporation of joint and common costs into their analysis framework, the cost thresholds generated by TSLRIC studies do not represent full consideration of the LECs costs to deliver a service nor provide a fair and reasonable price for the service. The Department has recognized that fact and has thus endorsed the principle of contribution as a means to recognize at least some of the common or shared costs incurred in the provision of the respective service. See Decision, Docket No. 94-10-01, June 15, 1995, p. 27. Contribution represents nothing more than a monetary increment above the TSLRIC cost reflected in the margin for any given service. The amount of contribution approved through any given tariff should theoretically be sufficient to reduce the pool of unrecovered costs associated with the service over some period of time. Contribution, therefore, provides the LEC a pool of funds that will offset in part, if not in total, common costs not included in the TSLRIC.

In summary, in Docket No. 94-10-01 the Department reaffirmed many of the cost principles adopted in earlier proceedings as the continued policy of the Department under Public Act 94-83, and, where appropriate, refined policies to recognize the changes introduced by the Public Act. The following lists those principles that guide the Department's instant investigation and Decision:

- costs submitted to the Department for consideration must be real (or reasonable estimates) and must specifically relate to the services in question (Decision, Docket No. 92-09-19, July 7, 1993, p.139; Decision, Docket No. 89-12-05, June 28, 1991, pp. 9 and 10; Docket, Docket No. 88-03-31, August 8, 1990, p. 15)

- cost methodologies must employ principles of cost causation that are consistent with prior Department Decisions and practices (Decision, Docket No. 94-10-01, pg. 26)

- cost methodologies must be forward looking (Decision, Docket No. 88-03-31, August 8, 1990, III.A.1)

- cost methodologies must distinguish among costs incurred on behalf of monopoly, emerging competitive and competitive services (Id.)

- cost methodologies must provide an accurate means of measuring incremental cost for services (Decision, Docket No. 89-12-05, June 28, 1991, V.4)

- cost methodologies must recognize the effect of broader market participation on the goals of establishing equitable and reasonable rates (Id., IV.4)